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Supreme Court of the United States

OCTOBER TERM 1949

No. 615

JOHN MANSAVAGE
Petitioner

v.

THE UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

HAYDEN C. COVINGTON
Counsel for Petitioner

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

No.

JOHN MANSAVAGE
Petitioner

v.

THE UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

John Mansavage petitions this Court for a writ of certiorari and shows unto the Court as follows:

Statement of Matters Involved

Opinion of the Court Below

The opinion of the Court of Appeals, reversing the judgment of conviction in this case, is not yet reported. The opinion appears in the record. [222-232][1]

Jurisdiction

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 and by Title 28, Section 1254 (1) of the United States Code. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934 and Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

Timeliness of This Petition

Judgment affirming the conviction was rendered and entered December 27, 1949. [232-233] Time for filing this petition for writ of certiorari was extended by order of this Court to February 20, 1950. [238]

Statutes and Regulations Involved

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended, (50 U. S. C. App. §§ 301-318) are drawn in question here, as well as Sections 615.82, 623.1, 623.2, 625.1, 625.2, 625.3, 626.1-626.14, 627.11-627.14, 629.1, 629.2 (c), 651.1-651.8, 651.10, 652.1, 652.11, 652.12 and 653.11 of the Selective Service Regulations (32 C. F. R. Supp. 601.5 *et seq.*) promulgated by the President under said Act.

[1] Figures appearing herein in brackets refer to pages of printed transcript of record.

Questions Presented

(1) Did the court below err in not reversing when the evidence was fully developed and indisputably showed that there was a violation of petitioner's rights to procedural due process by the local board upon a personal appearance and oral hearing, requiring a judgment of acquittal?

(2) Did the court below err in not holding that the failure of the local board to reduce to writing the oral testimony given by petitioner was a violation of petitioner's rights to procedural due process, contrary to the Selective Training and Service Act of 1940, and the Regulations promulgated thereunder?

(3) Does the undisputed evidence show that petitioner is not guilty of refusing to submit to induction as charged because the proof showed that he never reached the room where the induction ceremony was had and there is no evidence that he was ever ordered to submit to induction?

(4) Did the trial court commit reversible error in excluding the testimony of the chairman of the appeal board offered to show arbitrary and capricious action?

(5) Did the trial court commit reversible error and deprive petitioner of his right of trial by jury contrary to the Constitution in excluding from the hearing of the jury the testimony of the petitioner concerning the denial of a full and fair hearing upon an appearance and oral hearing before the local board?

(6) Did the trial court commit reversible error in refusing to submit the requested instructions raising the issue of whether there was a denial of procedural due process by the local board upon a personal appearance before it by petitioner?

Statement of the Case

Form and History of the Action

This criminal action was instituted in the district court by return of an indictment charging petitioner with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [2-3, 217] The indictment, among other things, alleges that after petitioner reported at the induction station, he "unlawfully, willfully, knowingly, and feloniously did neglect and fail to perform the duty of submitting to induction". [3]

On March 9, 1948, the petitioner pleaded not guilty. [3, 217] On January 11, 1949, the cause was called for trial to a jury before the Honorable Michael L. Igoe. [1, 4, 217]

At the close of the Government's case the petitioner moved for a judgment of acquittal. [42-43] The motion was denied, with exception. [43, 217] At the close of all of the evidence the petitioner moved for a judgment of acquittal. [103-108] The motion was overruled, with exception. [108-109, 207, 218]

Requested instructions were submitted to the court at the close of the evidence and prior to the argument by counsel. [109-113, 204-205] The requested instructions by the Government were granted. [109-113] The requested instructions by the petitioner were refused, with exceptions. [113] The cause was argued to the jury by counsel. [114-119] Thereafter the court instructed the jury. [120-126, 218] The jury retired, to consider its verdict, and returned, finding the petitioner guilty. [208, 218]

The petitioner renewed his motion for judgment of acquittal after the return of the verdict. [218] The motion was overruled, with exception. [208-209, 218]

Facts

CLASSIFICATION AND INDUCTION

The petitioner, John Mansavage, now 28 years of age, registered under the Selective Training and Service Act of 1940, as amended, on February 16, 1942. [12, 129, 161] He was given order number 10,480. [12, 161] He was mailed a Selective Service questionnaire on May 13, 1942. [12, 162] It was filled out, verified and returned by him to the local board on May 21, 1942. [12, 167]

In the questionnaire, petitioner showed that he resided at Plover, Wisconsin, that he was 21 years of age and had completed 8 years of elementary schooling, but had no high school education. [163] He showed that he was a farm laborer and worked for his father, a millwright. [163-164] He showed that he lived on a farm and was responsible for its operation. [164]

Under Series VIII of the questionnaire, Mansavage showed that he was a minister of religion, customarily engaged and serving as such as one of Jehovah's witnesses, since August, 1936, and that he had not been "formally" ordained. [14, 165] He claimed classification as a minister of religion, entitling him to be placed in Class IV-D. [14, 166]

Simultaneously with the preparation and filing of the Selective Service questionnaire, petitioner also prepared and filed a Special Form for Conscientious Objector. In this form he said that it was contrary to God's will for him to serve in earthly armies or participate in war in any form. He supported his claim with a large number of scriptural quotations. [14, 169-170] He indicated that he received his training and belief in respect to such matter by study, since 1930, of the Bible and publications of the Watchtower Bible and Tract Society. [171] He relied upon

his preaching activity as the best proof of the demonstration of his convictions. [171] He stated that he was one of Jehovah's witnesses, associated with the Watchtower Bible and Tract Society since 1936 and designated the location of his church. [172]

On July 24, 1942, the local board placed Mansavage in Class I-A-O, which made him liable for training and service in the armed forces as a conscientious objector. [67, 167, 168] Upon receipt of this classification the petitioner went to the local board and requested a personal appearance. [68] He there made an affidavit stating that he was one of Jehovah's witnesses, opposed to war, and claimed IV-D classification. He requested in the affidavit an opportunity to appear before the board. [193] He was notified in writing to appear before the board on August 11, 1942. [68, 197] At the time specified he appeared and was referred to one member for a hearing. [68] At the close of the hearing, he was classified in IV-E as a conscientious objector, opposed to both combatant and noncombatant service, which made him liable for training and service in a civilian public service camp. [168, 184]

On August 20, 1942, petitioner signed the appeal statement on the questionnaire [167] and filed a written statement of appeal stating that he was a minister, and claimed IV-D classification and exemption from all training and service. [188] On August 26, 1942, his Cover Sheet was forwarded to the board of appeal. [194]

Subsequent to his taking the appeal and before the board of appeal rendered its classification, his case was referred to the Department of Justice for an investigation on September 18, 1942. [189] There was a hearing on November 30, 1942, before a hearing officer of the Department of Justice. A report of this hearing was made by the hearing officer in which the facts appearing in the Special Form for Conscientious Objector were summarized and the facts based on the evidence received by the hearing officer were

reduced to writing. The hearing officer found petitioner to be sincere and active as one of Jehovah's witnesses. He recommended that the conscientious objection claim be sustained. His report was made on November 30, 1942. [174-178]

Thereafter the board of appeal, after denying petitioner's claim for exemption as a minister of religion, classified petitioner in IV-E, which made him liable for assignment to a civilian public service camp. He was mailed notice of such classification on February 19, 1943. [16, 168] On February 23, 1943, the local board received an anonymous letter, signed by "Several Disgusted Citizens of Plover", containing inflammatory and antagonistic remarks against petitioner to his prejudice. This letter the local board placed in his file. [192]

Petitioner was requested to fill out an Agricultural Questionaire. This he did. It was received by the local board from him on March 11, 1943. It indicated that he "did the following work other than farming during the last 12 months: Explain *truck driver*". [134]

He requested an opportunity to appear before the local board. Notice, mailed on March 26, 1943, by the local board, directed him to appear on March 31, 1943. [197-198] Following this hearing, he was continued in Class IV-E. [185]

On April 1, 1943, he again requested a hearing before the local board, stating that he had been advised by one of the members of the board to go see the hearing officer of the Department of Justice at Madison for advice. He said that he wanted to appear before the board following his interview with the hearing officer. [187] He went to Madison and saw the hearing officer as directed by the chairman of the local board. [77] While at Madison the hearing officer had unlawfully informed Mansavage that he could not get a Class IV-D as long as his Special Form for Conscientious Objector was on file with the local board. The hearing officer advised him to withdraw the form. As a result of

this advice, on April 7, 1943, he went before the board and signed a statement withdrawing his claim as a conscientious objector. [78, 178]

On April 8, 1943, Mansavage appeared before the local board for a hearing. [77-79] Following this appearance the local board placed him in Class II-C on condition that he would continue working on his father's farm as disclosed in the Agricultural Questionnaire. The classification deferred him as a necessary farmer. [88, 134-136, 138, 168]

On February 26, 1944, Mansavage filed a Supplemental Agricultural Questionnaire in which he showed the time devoted to his farm work and additionally, that he did non-farm, "logging" work, all winter. [138] He was thereafter continued in Class II-C on April 14, 1944, and again on November 1, 1944. [168]

On January 17, 1945, he filed another Supplementary Agricultural Questionnaire showing his continued farmer status and reciting that he preached at least one and one-half hours per day. [143] He was also working with his brother at the lumber yard. [98] The armed forces made a report of his physical examination in February, 1945, to the local board showing that Mansavage was working in a lumber yard as his occupation in addition to farming. [145-146] On March 29, 1945, the County War Board reported that Mansavage was necessary and irreplaceable as a farmer. [147] On May 2, 1945, and again on November 14, 1945, the local board continued Mansavage in Class II-C. [190]

On March 4, 1946, Mansavage filed a Supplement to Agricultural Questionnaire showing his continued status as a farmer and laborer. [149-150] The County Agent, in

making his routine check, found Mansavage "at lumber yard. Work on farm done up." [150-151]

Thereafter on April 3, 1946, the local board placed Mansavage in Class IV-E. [190, 198] On April 8, 1946, petitioner complained to the local board about this classification and asked for a "discussion with the entire board". [99, 196] He appeared for a hearing on April 17, 1946, following which he was reclassified to I-A. [179, 190, 191] He appealed in writing from this classfication on April 25, 1946, claiming Class IV-D. [186, 190] The case was again referred to the board of appeal, which board placed him in Class I-A on June 6, 1946. He was notified of such classification by the local board on June 16, 1946. [190, 191]

By order dated June 14, 1946, Mansavage was directed to report to his local board to proceed for induction on June 27, 1946. [100-101, 179-180, 203] He reported and proceeded through the process at the induction station including the physical examination and down to the point where he was requested to get a military uniform before proceeding into the induction room. [36-37, 38, 39, 40, 41, 100-101] He was never ordered to submit to induction. The reason was that he "eloped" at the end of the physical examination and other preliminaries of the process and before he was ordered into the induction room. He never got into the induction process room at all. [36-37, 38, 39, 40, 41, 100-101, 102] The Certificate of Fitness filled out by the armed forces following his appearance at the induction station recited that he was "physically fit, but unacceptable for other reasons." [183] He was reported as a delinquent, because he "Eloped prior to completion of induction." [153, 155, 182]

DENIAL OF PROCEDURAL DUE PROCESS

(1)

On August 11, 1942, the petitioner appeared before the local board for a personal appearance at which new and additional oral evidence was given to the board and considered by it. He told the board that he was claiming Class IV-D. [68] He informed the board that, although he was "not formally ordained", he had been actually ordained and was an ordained minister of the gospel. He explained why it was, in that connection, that he answered in the questionnaire that he had not been "formally ordained". He explained that from his early youth—because he was born into a family of Jehovah's witnesses—he had been trained and brought up in the nurture and admonition of the Lord and dedicated for the ministry. [71] He explained that he had studied the Bible from his youth up and learned at an early age that it was his obligation to tell others what he learned in God's Word as a minister of the gospel. [71] He quoted to the board the scripture at Matthew 24:14, "This gospel shall be preached in all the world for a witness unto all nations; and then shall the end come." [71] He explained how he had been ordained, and the ceremony he had gone through. [71] He showed that his preaching from house to house was following in the footsteps of Jesus Christ, and of the Apostle Paul who said, "I kept back nothing that was profitable unto you, but have shewed you, and have taught you publickly, and from house to house." (Acts 20:20) [72] He said that he was carrying on such work publicly upon the streets and by preaching from house to house.

He testified that the board member interrupted him by saying that the board had not given any of Jehovah's witnesses a ministerial classification and that "the Local Board wasn't going to regard me as a minister either, so there wasn't no more need to tell him about it." [72] The board

member insisted that Mansavage give up his ministry and take a farmer's classification, but Mansavage "told him I couldn't accept that proposition because it would jeopardize my position as a minister, and I couldn't accept it, and that was the end of the hearing, and I left rather dissatisfied." [72]

Although the written memorandum made by the board and placed in the file, August 11, 1942, recited about his father's farm and employment of his family in detail, it merely stated that the claim for IV-D classification "as an ordained minister is denied by the board." [184] Nowhere in such memorandum was any of the oral evidence in respect to the petitioner's activity as a minister reduced to writing. [184]

(2)

On March 31, 1943, the petitioner appeared before the local board for another personal appearance. He said that he wanted his classification changed from IV-E to IV-D; that he did not have an opportunity to present all the evidence to Mr. Levi, the member before whom he had appeared at his first hearing. He again related to the board the same evidence given on the first hearing [74-75], mentioning about his training during his youth for the ministry and about his ordination. When he attempted to explain his ministry, the board informed him that it was beyond the authority and jurisdiction of the board to consider his claim for exemption. The chairman of the local board told him: "Your case, as far as a minister is concerned, has been considered by the Board of Appeals, and it has been decided in Washington that none of Jehovah's Witnesses are ministers, and we won't give you a 4-D classification. We wouldn't go over the heads of the Appeal Board in acting upon that." [75]

Mansavage then handed the chairman of the board a copy of Opinion No. 14 prepared by General Hershey, Di-

rector of Selective Service System. [75] The opinion appears in his file. [199-203] He pointed out how it was that the opinion says that one may be a minister of religion entitled to exemption, "without having been formally ordained, but one recognized by the different members of that organization as being a minister." [75]

He offered to bring written records from his church and produce other witnesses to testify in his behalf. The board refused to allow him to do this, voluntarily saying that it had "been decided in Washington that Jehovah's witnesses were not ministers and I was not going to get a 4-D classification, and they wouldn't give me the class of 4-D either. He told me if they gave me a 4-D classification they would have to give all the rest of Jehovah's witnesses a 4-D classification. He said there wasn't any of Jehovah's witnesses got a 4-D classification, and I wasn't going to get one either." [76] Mansavage informed the board that he knew several of Jehovah's witnesses, registered with other boards, in identically the same position as he, who had been given exemption and IV-D classification as ministers. [76] The board informed him that they had acted in his case and that "they were not going to give me a 4-D classification." [76]

The board informed Mansavage that he would have to give up his ministry and put all of his time in farming if he expected to avoid induction. The chairman recommended that he go see the hearing officer of the Department of Justice at Madison for further advice as to the effect of his IV-E classification. [77]

Following his personal appearance the local board made a written memorandum. The memorandum did not attempt to reduce to writing any of the new and additional information that Mansavage gave upon the occasion of his personal appearance pursuant to the notice received by him, as is required by the Regulations. [185] The memorandum merely stated: "The registrant was informed that this Board

so interpreted the rules that he could not be placed in Class 4-D, but since the Appeal Board has decided on his classification as 4-E, there is nothing more that this Board can do except to consider a deferment for agricultural reasons. The registrant is apparently dissatisfied and expressed his intentions of taking up the matter with the Selective Service officials in Madison, which meets the approval of this Local Board. He was also informed that as the matter now stands it will be necessary for him to either be a full-time farmer or be sent to Milwaukee for his final examination." [185]

(3)

On April 17, 1946, following action by the local board in withdrawing petitioner's farm deferment and placing him in Class IV-E on April 8, 1948, he appeared for a hearing. [79-80] He again informed the local board that he wanted his classification changed from IV-E to IV-D. [80] Although the board had a duty to consider his case *de novo,* it informed the petitioner that "my case, as far as a minister was concerned, has already been decided. [The chairman] said it had been decided in Washington that none of Jehovah's witnesses were ministers and the Local Board and Appeal Board decided that I was not to get a 4-D classification. I recalled to his mind that that was 1943 when the Local Board and the Appeal Board acted on my claim as a minister, and now, three years later, a lot of changes had taken place besides what I informed them before. I told them I never had an opportunity to tell Mr. Kraus and Mr. Somers and Mr. Crowell before, that I spoke mostly to Mr. Levi and Mr. Kraus before. Anyway, I explained my ministry to them again, that I was ordained minister." [80] He reviewed his life training for the ministry, beginning at his youth and he gave them scriptural as well as other facts in proof of his ministry. He referred again to the provisions of Opinion No. 14 of General Her-

shey, previously discounted by the board. [82] The board told him that if he was willing to put the time he was devoting to the ministry into farm work it would be willing to give him back his farm deferment. [80-81] He said he would not do this. [81]

Again he offered to bring written records from the Kingdom Hall, his church, and to produce written affidavits and bring others to testify in his behalf as a minister. All these requests were refused with this statement: "I don't care what records you have at the Kingdom Hall or anywhere else. It has been decided in Washington that Jehovah's Witnesses aren't ministers, and we are not going to give you a 4-D classification either." [81] The chairman mentioned "several times that the Board of Appeals had already acted on my case and they cannot go above the Board of Appeals. He seemed to want to put the reason for my being not in 4-D on the Appeal Board. He said they couldn't go above the heads of the Board of Appeal in that respect." [81]

In proof of the fact that his circumstances had changed, since his last hearing in 1943, Mansavage showed that he had received additional schooling, having gone two years to the Vocational School and had attended four additional years in a ministry school at Stevens Point where he and others learned "ways and means to preach the Gospel to the people in a better manner. We took up a careful study of grammar and how to prepare Bible talks and the composition of them and the proper introduction, and the conclusion, and we learned how to make them coherent and how to emphasize, and keep our audience in contact with what we were saying, and so forth, and that we were appointed or given assignments to give Bible talks before an audience, and that we received instruction from an instructor." [81]

He also pointed out that he had been an instructor in the ministry school since 1943, that he delivered public Bible

sermons from the platform, and that he had been elevated to a position in the church that required him, as a minister, to perform "the duties of what the orthodox ministers of religion on earth today do. I pointed out that I performed Baptisms in the presence of others, that I conducted funeral sermons and also taught people publicly" and at their homes.

The board again asked him if he would give up his ministry and put the time thus spent into the farm. The board promised to give him Class II-C if he would do so. He told the board "I was not interested in that, that I wanted to have a 4-D classification. I told him I would continue to do as much farming as I had in the past but I wouldn't set aside or give up my ministry to get that 2-C classification." [82]

Mansavage described to the board in detail as to how he carried out all of his duties as an assistant presiding minister of the congregation in the capacity of conductor of the Theocratic Ministry school, to which position he had been elevated since his hearing three years previously. Mansavage said:

". . . I was required to deliver a Bible talk to them each week in the form of an instruction talk, in which such things as the preparing of a talk, gathering material, construction of a talk, and grammar, and also we took each Bible book and considered it individually, and in the instruction talk was incorporated facts about the Bible book, and I assigned three students to give a talk on that particular Bible book, and it took a lot of preparation on my part.

"I pointed out that I devoted from 60 to 100 hours a month in preaching the different sermons and also in making preparations for the conduct of the school. I pointed out besides preparing the talks and conducting the reviews that I had to acquaint myself with all the information contained in the different talks given by the different min-

isters so I could acquaint myself with a choice of material, and so forth. . . .

"I told him during what is known as service meeting I oftentimes addressed the entire congregation in which we all discussed ways and means of bettering our ministry, and I also pointed out to him that since our 1943 hearing that we all delivered Bible talks of one hour duration to the public. . . .

"I offered to bring written affidavits from different ministers of the congregation. I wanted to bring them down there to testify in my behalf. He told me it was not necessary because my case, as far as the ministry classification was concerned, was closed because the Appeal Board acted on it and they wouldn't go over the head of the Appeal Board." [83, 84]

The petitioner testified that all of the oral evidence that he gave was new and further information and elaborated upon and augmented the sketchy written claims appearing in his questionnaire and other papers. [84-85]

After having been before the board for an hour, he was informed by the chairman: " 'I told you a dozen times, and I am telling you once again and the last time,'—and he shook his head and hands at me when telling me this—'that your case, as far as a minister is concerned, is finished. We won't give you a 4-D classification. I will give you a final opportunity to get a 2-C classification if you will set aside your ministry.' " [85]

Although there was a hearing, at which new and additional oral evidence was given for an hour, the local board made absolutely no memorandum whatever as to the extensive evidence and facts given by Mansavage, which established the facts proving that he was regularly and customarily engaged in teaching and preaching the doc-

trines of a recognized church and that he stood in the same relation to Jehovah's witnesses as do the orthodox clergy to their religious organizations, and that he was entitled to Class IV-D and exemption, according to the statement of General Hershey in Opinion No. 14. [179, 199-203] The board merely stated in the memorandum, "Registrant appeared before the Board at his own request, and requested a 4-D classification. He stated that he was not interested in any other classification. Registrant had submitted a Form 45-W, but not completed. . . . Members of the Local Board, after reviewing the information in registrant's file, voted 3 to 0 to classify registrant in Class 1-A." [179]

How Issues Raised

Denial of Procedural Due Process by Board

At the close of all the evidence, the petitioner made his motion for judgment of acquittal on the grounds that there was a denial of procedural due process by the local board in that its members were prejudiced and failed to give a full and fair hearing as well as refused to reduce to writing the oral testimony given by petitioner upon his personal appearance before the local board.

Following the verdict of guilty, petitioner moved again for a judgment of acquittal. The renewed motion for judgment of acquittal was based on the same grounds as that made at the close of the evidence before the case was submitted to the jury.

These issues properly raised the questions presented upon appeal to the court of appeals and support the questions presented upon this petition for writ of certiorari.

Erroneous Exclusion of Testimony of Chairman of Board

The testimony of the chairman of the board of appeal was offered by the petitioner for the purpose of showing that the action of the board of appeal was arbitrary and capricious. This testimony is entirely too lengthy to be set out in the petition. All of the portions of the deposition that were considered material were identified in the record at pages 48-49, and the court stenographer was allowed by the trial judge to copy the pertinent parts of the deposition into the record in this case. The Court is here referred to the proffered testimony. It appears in the record, beginning at page 50 and ending at page 63. [48-63] The trial court excluded this evidence, on objection of the Government, to which the petitioner excepted. [49-50]

Denial of Jury Trial by District Court

While the petitioner was testifying in respect to his hearing before the local board on August 11, 1942, the Government objected on the ground that the testimony was immaterial. The objection was answered. The court asked the prosecutor if it was not a matter for the court rather than for the jury. The prosecutor said it was. [69-70] Counsel for petitioner attempted to show that the rule confining the inquiry to the court and excluding it from the jury applied only to the question of classification and that it did not apply to whether or not the draft board had failed to accord procedural due process upon the personal appearance. [70]

Notwithstanding the argument, the trial court held: "So far as this Court is concerned, this is a matter which is

directed to the attention of the Court and should not be brought to the attention of the jury, so further testimony along this line, if the objection is made, will be sustained. I will be glad to hear his testimony outside the presence of the jury, however. Let's see what you have in mind, whether the Government agrees to it or not. MR. COVINGTON: What is the objection? MR. LOOBY: I am objecting to the testimony being addressed not to the Court, as I believe it should be. MR. COVINGTON: What is the ruling? THE COURT: The objection is sustained. MR. COVINGTON: And I say that it should be given in the presence of the jury for the sake of the record." [70]

Thereupon the petitioner was denied the right to testify before the jury about what took place upon his personal appearance.

In the absence of the jury, the petitioner testified extensively as to what took place upon his personal appearance as related above under the heading, DENIAL OF PROCEDURAL DUE PROCESS, *supra*, pages 10-17. [71-85] The court was again requested to allow this evidence to go to the jury and not confine it to the hearing of the judge. The court refused to change his ruling and persisted in the holding that the evidence as to any violation of procedural due process by the local board should not be given in the presence of the jury. [73]

At the close of all the evidence, counsel again informed the court, in respect to the violation of procedural due process: "I think the ruling is contrary to law, that the ruling as the Court has construed and applied it, would make ineffective the right of trial by jury in respect to his defenses before the Court, contrary to the Constitution." The

court again ruled, "The record may show your exception." [85]

Requested Instructions

At the close of the evidence, the petitioner submitted requested instructions. [204-207] The first asked the judge to charge the jury that if the petitioner gave, upon his personal appearances, new and further information about his ministerial status, then it was the duty of the local board to reduce it to writing for the benefit of the board of appeal and the failure of the local board to so do constituted a violation of the law, making the order to report void, entitling the petitioner to a verdict of acquittal. [204-205]

The second asked the judge to charge the jury that if the petitioner endeavored to give, upon his personal appearances, new and further information and was prevented from doing so by the local board, or if the board refused to listen to or consider the new and further information, it would be the duty of the jury to acquit the petitioner. [206]

Specifications of Error

The Court of Appeals for the Seventh Circuit erred—

(1) In affirming the conviction rather than directing the entry of a judgment of acquittal,

(2) In holding that no error was committed by the trial court.

Reasons Relied on for Granting Writ

It is of the utmost importance that the decisions of the courts of appeal be consistent in cases where the facts are the same or substantially similar. The failure of the court below to hold as a matter of law that the action of the draft board denied the petitioner the right to a full and fair hearing before the board of appeal and upon his personal appearances before the board conflicts with *United States* v. *Stiles,* 169 F. 2d 455 (C. A. 3d).

It has been held that, upon reversing a judgment of conviction, the appellate court may, if the evidence is not sufficient to warrant the submission of the question of defendant's guilt to the jury, remand the cause "with directions to discharge the appellant." *Cemonte* v. *United States,* 89 F. 2d 363.

The decision of the court below, therefore, conflicts with the holding just referred to, because the evidence is undisputed.

The failure of the court of appeals to remand the case for a new trial in event it did not find, as a matter of law, that the rights of the petitioner to procedural due process had not been violated also conflicts with *Niznik* and *Comodor* v. *United States,* 173 F. 2d 328 (C. A. 6th), certiorari denied June 6, 1949, 337 U. S. 925, 69 S. Ct. 1169. In those cases the testimony of the defendants was undisputed; nevertheless, the court ordered a new trial.

Related to this contention, that the court of appeals erred in failing to order a new trial, is the ruling of the district court that the issue of whether procedural due process had been violated by the local board was not a fact question for the jury. The district court then excluded from the consideration by the jury the testimony offered by the petitioner. The order of the trial judge excluding the jury from the courtroom while the petitioner was testifying was a most egregious error. It denied him the right of trial

by jury. If the court had granted the motion for judgment of acquittal, the error would have been cured. The district court, however, denied the motion and submitted the case to the jury, excluding the issue of procedural due process. Whether due process of law was violated by the local board upon the personal appearance was a fact question for the determination of the jury in event the court did not grant the motion for instructed verdict. There may have been a conflict of testimony between the petitioner and the Government's witnesses. In fact, even if there was not a conflict on what the petitioner told the local board orally, his testimony as to what he told the local board upon the personal appearance would become a question of fact for the jury because the credibility of the petitioner's testimony, even though undisputed, would have been an issue for the jury.

The ruling of the trial court, excluding the evidence offered by petitioner from the hearing of the jury, is in direct conflict with *United States* v. *Zieber*, 161 F. 2d 90 (C. A. 3d) and *Smith* v. *United States*, 157 F. 2d 176 (C. A. 4th). In those cases the courts ordered new trials. See also *Niznik* and *Comodor* v. *United States*, 173 F. 2d 328 (C. A. 6th).

The importance of having an administrative agency reduce to writing oral testimony given to it and considered by it for an appellate administrative agency and the question of denial of a full and fair hearing by the administrative agency are grave questions of administrative law which have not been, but which should be, decided by this Court. This is a most important reason for a review of the case here presented.

The unprecedented departure by the trial judge in excluding the jury from the courtroom while the petitioner

testified upon an issue which may have become and was a jury issue (*United States* v. *Stiles*, 169 F. 2d 455 (C. A. 3d) and *Niznik* and *Comodor* v. *United States*, 173 F. 2d 328 (C. A. 6th)) was an aberration in the history of criminal trials in the federal courts. The issue of whether the draft board reduced to writing all of the testimony given by the petitioner on an oral hearing was a question of fact. Whether it failed to send up to the board of appeals a complete record of all of the oral evidence presented by the petitioner was a mixed question of law and fact. If the court was of the opinion that the testimony of the petitioner was undisputed, then it would have been the duty of the trial court, if he believed the evidence to be sufficient, to render a judgment of acquittal. Even if undisputed, yet if not sufficient to justify a judgment of acquittal, the testimony of petitioner on the issue of what he told the local board on the occasion of his personal appearance was a question of fact pure and simple for the jury to decide.

When the trial court excluded the jury from the courtroom and did not allow the jury to consider the testimony of the petitioner the trial court denied the petitioner the right to a jury trial, contrary to the Constitution. The jury did not have a chance to hear, consider or pass on the question at all. The trial court usurped his functions as a trial judge. Since this was a jury trial the trial judge had no right to isolate part of the evidence for himself to hear and consider.

The testimony was either admissible or it was not. If admissible it should have been considered by the jury. This is not a situation where the trial judge has a prerogative to make a preliminary inquiry in respect to the admissibility of evidence. The trial judge in a murder prosecution has the right to inquire into the facts and circumstances surrounding an alleged confession of the defendant preliminarily and in the absence of the jury. This is not such a

situation. Even if it were and the trial judge concluded that the evidence was admissible, it would have been the duty of the trial judge to let the jury consider such evidence. If a confession is admissible it is not the prerogative of the trial judge to admit it and then he alone consider it.

The constitutional guarantee of the right of trial by jury required the court to let the jury hear and consider the evidence. The action of the trial judge in this case was in fact a deprivation of the right of trial by jury and violated the rights of petitioner to procedural due process in criminal cases.

The fact that this was an administrative law case does not eliminate the fact that the question was for the jury. That the case may be a draft board proceeding does not alter the situation. The Court has held that draft prosecutions involve the responsibility of the courts to make a judicial inquiry as to the validity of the draft board proceedings. *Estep* v. *United States*, 327 U. S. 114, 66 S. Ct. 423; *Gibson* v. *United States*, 329 U. S. 338, 67 S. Ct. 301. The case is therefore a criminal prosecution in which a jury issue was involved. The trial court committed a most egregious error when the jury was not allowed to hear or consider the petitioner's testimony. (See point "Third" at the top of page 231 of the record and its rejection without a discussion by the court of appeals at pages 231-232 of the record.)

The court below relies on *Cox* v. *United States*, 332 U. S. 442, 68 S. Ct. 115. That decision of this Court is not decisive. It does not support the holding of the court below. What was involved in the Cox case were the papers and documents in the draft board file. In such a situation where the court is called upon to interpret written documents, it has been uniformly held to be a question of law for the court, but where there is an issue of fact as to what was or was not

said by a registrant to the draft board and the question is not disposed of by documentary evidence filed with the local board, then a fact question for the jury does arise. *United States* v. *Zieber,* 161 F. 2d 90 (C. A. 3d) and *Smith* v. *United States,* 157 F. 2d 176 (C. A. 4th).

This was a startling departure from ordinary procedure in administrative law and criminal cases by the trial court. Therefore a most important question of procedure in criminal prosecutions in the district courts involving questions of fact occurring before an administrative agency in issue in criminal prosecutions is invovled. This is a most cogent reason why this Court should review the decision of the court below approving such departure.

Conclusion

For the reasons stated, your petitioner prays that this Court issue a writ of certiorari to the Court of Appeals for the Seventh Circuit directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that this Court reverse the judgment of said court of appeals affirming the conviction, and order a judgment of acquittal entered, as was done in the case of *United States* v. *Stiles* (169 F. 2d 455) where the court said: "The judgment of the district court will be reversed and the cause will be remanded with directions to enter a judgment of acquittal." In the alternative your petitioner prays that this Court reverse the judgment and

remand the cause for a new trial consistent with this Court's opinion; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

JOHN MANSAVAGE

Petitioner

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SUPPORTING BRIEF

ONE

The failure of the local board to reduce to writing oral evidence, offered by the petitioner upon his personal appearances, deprived the board of appeal of evidence, contrary to the Regulations, and thereby invalidated the order supporting the indictment.

The Regulations require that the local board reduce to writing and place in the registrant's file all oral evidence submitted by him pertaining to his classification. Section 615.82 provides, *inter alia*, "Every paper pertaining to the registrant, except his Registration Card (Form 1) . . . shall be filed in his Cover Sheet (Form 53)."

"The registrant's classification shall be made solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; . . . Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file." (Section 623.2. See also Section 625.2 (b), Regulations.)

"If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts." (Section 627.13 (b))

Section 627.13 (b) of the Regulations required the local board to "carefully check the registrant's file to make certain that all steps required by the regulations have been taken and that the record is complete." The local board disregarded the Regulations and acted in complete defiance thereof, thus flouting the law and showing utter contempt for the petitioner's right under the Regulations.

The Regulations quoted above and the duty that they impose upon the local board have been fully considered by the Court of Appeals for the Third Circuit in *United States* v. *Zieber*, 161 F. 2d 90, and *United States* v. *Stiles*, 169 F. 2d 455.

The Regulations contemplate that the classification upon appeal shall be *de novo*. The board of appeal and the President do not have an opportunity to permit the registrant to appear before them personally; they are confined in their consideration to the record made in writing. If the local board did not comply with the Regulations requiring it to make a full record of all the facts and evidence considered by it, the appeal agency of the Selective Service System would be entirely at the mercy of the local board. If a record was not made of all the facts and evidence which properly entered into the judgment of the local board, then the board of appeal would not be in as good a position to pass on the case as was the local board. The Regulations contemplate that the local board shall make a record of all the evidence considered by it so that the board of appeal shall be in equally as good a position to pass upon the classification of a registrant as the local board.

The undisputed evidence showed that the local board failed to reduce to writing and place in the petitioner's file vital oral evidence submitted by him at personal appearances relative to his status under the Act. When he was at the hearings he offered extensive additional oral evidence which was concededly received by the local board. The local board, although it did hear the oral evidence, did not reduce it to writing and place it in the cover sheet as required by the Regulations. The board of appeal did not see or have an opportunity to consider the additional evidence. It did not know of the action of the local board in withholding vital oral evidence received and considered.

It must be assumed that the claim for exemption was denied on appeal *de novo* solely because the local board

failed to include the new oral evidence in the cover sheet. It must be conclusively presumed that the classification of petitioner would have been different and he would, as a minister, have been exempted from training and service had the local board complied with the Regulations and included a summary of his oral evidence in the file.

"New" means recently made, recently become important and different from that theretofore known. "Information" means knowledge received on any subject. The term "new information" is not synonymous with "cumulative" or "corroborative".

"New information" certainly includes "further information", any matters, facts, circumstances or conditions that relate to the status of the registrant which had not been previously made known to the local board by the registrant.

The construction here contended for by petitioner is that if there is any "further information" submitted it is "new information". This analogy is corroborated by the Regulations. See Section 625.2 (b), providing, *inter alia*: "The registrant may present such *further information* as he believes will assist the local board in determining his proper classification." (Emphasis added)

Previously in the written information he had not informed the local board of the amount of time devoted to his ministry. The questionnaire showed that he did secular work during the week. In view of this showing it may well have been that the board of appeal concluded that he did not devote very much time to his ministry. Therefore it was highly important that he show the amount of time that he actually devoted to his ministry.

The time that he devoted to his ministry per month is a substantial time. It is as much as, if not more than, orthodox clergymen devote to their ministerial functions. Therefore the local board should have reduced this to writing for the benefit of the board of appeal. It is wrong to say that it is not "new information".

Furthermore the local board made a great deal over the fact that the petitioner did not attend a theological school. The members apparently were of the opinion that petitioner had not received adequate training in the school that he attended in preparation for the ministry. The papers filed with the local board did not go into an explanation of the course of study and the precise nature of petitioner's preparation for the ministry. The petitioner offered extensive evidence in respect to the course of study that he had pursued. This oral evidence showed that he pursued a course of study that was at least equivalent to that pursued by many orthodox clergy in preparation for their ministry. Therefore this evidence, although corroborative, was not cumulative but was entirely "new information".

Certain it was that petitioner had not fully informed the local board about his ministry or about the extent of his training and schooling in preparation for the ministry. The information which he offered was "new". The fact that it may have been cumulative of previously submitted or different facts, or corroborative of his claim made that he was a minister, does not prevent it from being "new information" or "further information". Therefore it was the duty of the local board to make a summary of the new information submitted to it by the registrant.

It cannot be argued that the local board had no duty to reduce the oral information to writing because it was not new and additional. It would be fantastic to contend that all of the oral evidence given by the petitioner had been theretofore submitted by him to the local board in writing. An examination of the papers filed by petitioner with the local board shows conclusively that he did not attempt in any way by writing to submit to the local board details in writing in respect to his ministerial status. Indeed the evidence shows that, upon several occasions, when he appeared before the local board and offered to file written evidence in the form of affidavits and statements by per-

sons who were familiar with his ministerial service, the local board refused him this right, stating that it would do him no good and that he should not file such written information.

But, regardless of whether he negligently failed to file written information, or because of representations of the local board he failed to do so, the fact remains that the oral information given by him was new and additional.

Therefore the holdings of the United States Court of Appeals for the Sixth Circuit in *Peterson* v. *United States,* 173 F. 2d 111, and *Niznik* v. *United States,* 173 F. 2d 328 (decided March 7, 1949), do not apply. In those decisions it was held that there was no violation of the regulations by not reducing testimony to writing because the oral information submitted was repetitious of the written information theretofore submitted to the local board and which appeared in the file.

Also it cannot be said that it was harmless error for the local board not to reduce to writing the oral evidence because Section 627.2 of the Regulations gave the right to the petitioner upon appeal to attach to his notice of appeal a written statement setting out in full any information which was offered to the local board but which the local board failed or refused to include in the cover sheet.

The effect of this regulation, where the local board fails to perform its duty under Sections 615.82, 623.2, 625.2 and 627.13 of the Regulations, was considered by the Court of Appeals for the Fourth Circuit in *Smith* v. *United States,* 157 F. 2d 176 (1946) where the court said: "In our opinion this regulation does not relieve the local board of its duty in the premises or mitigate the consequences of a failure on its part. The regulation confers a privilege but does not impose a duty upon the registrant; for it cannot be supposed that Congress intended to deal with registrants as

if they were engaged in formal litigation, assisted by counsel, and therefore charged with the obligation to examine and approve a record on appeal." (*Smith* v. *United States*, 157 F. 2d 176, at p. 183) This particular holding in the *Smith* case was followed by the Court of Appeals for the Sixth Circuit in *Niznik* v. *United States*, 173 F. 2d 328 (decided March 7, 1949).

In *United States* v. *Zieber*, 161 F. 2d 90 (C. A. 3d) it was held that when new information was submitted it was the duty of the local board to reduce to writing all new information submitted by the registrant. In that case the court reversed and remanded the case for a new trial. This apparently was because the court was of the opinion that the conflict between the testimony of the defendant and the clerk of what actually took place at the local board presented an issue of fact which made that case one strictly for the jury.

The position taken here is supported by the decision of the Court of Appeals in *Kulick* v. *Kennedy*, 157 F. 2d 811 (C. A. 2, 1946), reversed on other grounds *sub nom. Alexander* v. *Kulick*, 332 U. S. 174 (1947).

There is absolutely no dispute in the evidence as to what took place before the local board on the occasion that petitioner appeared before it. Therefore the evidence is undisputed that he offered "new information". The evidence is further undisputed that the local board failed to reduce to writing any of this "new information" and send it to the board of appeal. There being undisputed evidence showing that there was a violation of the Regulations by the local board, it was the duty of the court below to find that the order supporting the indictment was lawless and void. Accordingly the judgment below should be reversed with instructions to order the indictment dismissed.

TWO

The denial by the local board of a full and fair hearing to petitioner upon his personal appearances invalidated the order supporting the indictment.

A

The local board illegally failed to consider all of the written evidence in petitioner's Cover Sheet and the oral evidence offered upon his personal appearances by petitioner as though he never before had been classified.

The undisputed evidence shows that upon each occasion that the petitioner appeared before the local board for a hearing, pursuant to the Regulations authorizing personal appearances, the local board paid no attention whatever to his testimony supporting his claim for exemption as a minister of religion. This was especially emphasized by the board members upon his last appearance before the board in 1946. The local board informed him that theretofore his claim for exemption as a minister had been submitted to the board of appeal when he appealed his case in 1943. The local board informed him that it could not reconsider and override the previous denial of his claim for exemption. Although three years had elapsed since his claim for exemption had been considered and rejected by the board of appeal in 1943, the local board, nevertheless, persisted in refusing to consider his claim for exemption *de novo* on the basis of the new information.

To establish here the error of the local board in failing to consider information which the petitioner was obligated, under the law, to submit to it, attention is called to the following Regulation:

"626.1 *Classification not permanent.* (a) No classification is permanent.

"(b) Each classified registrant and each person who has

filed a request for the registrant's deferment shall . . . report to the local board in writing any fact that might result in the registrant being placed in a different classification. . . .

"(c) The local board shall keep informed of the status of classified registrants. . . ."

The local board was concerned only in trying to get him to stop his preaching work and to put consecrated time into farming. Mansavage refused to do this. He, like the Apostle Paul, refused to be persuaded to abandon his covenant obligations with Almighty God. (Romans 8: 35-39)

At no time did the local board consider his claim for exemption according to his status as of the date he made his appearances before the local board. Therefore the undisputed evidence shows that the local board did not consider his classification as the law required according to the date that he was before the local board. On the contrary, the local board held that the claim for exemption had been denied by it on a former classification which was affirmed by the board of appeal and that such issue was no longer open for the consideration and determination of the local board.

It was nevertheless the duty of the local board to consider petitioner's claim for exemption as a minister of religion entirely anew, notwithstanding the fact that no new or additional information was submitted upon the personal appearance different from that previously given to the board. (Regulations, § 626.1) This was the specific holding of the Court of Appeals for the Third Circuit in *United States* v. *Stiles*, 169 F. 2d 455. In that case, Judge Maris, speaking for the court, said:

"We think that the purpose of the regulations in this regard is to require the local board to consider anew each registrant's classification who appears personally before it and to notify him of its action upon its classification so

that he may know definitely the result of his discussion with the board, which, of course, could result in a change of his classification even though he may have furnished no new information to the board . . .

" . . . It follows that the induction order was invalid and that Stiles, having exhausted his administrative remedies, was entitled to set up its invalidity in his defense. (*Estep* v. *United States,* 327 U. S. 114, 123) His motion for a judgment of acquittal should, therefore, have been granted.

"The judgment of the district court will be reversed and the cause will be remanded with directions to enter a judgment of acquittal."

It is submitted that the failure of the local board to consider petitioner's claim for exemption *de novo* and its action in treating the claim as though it was a closed question, having been previously determined, constituted defiance of the Regulations and arbitrary action, which invalidated the order supporting the indictment.

B

The local board illegally failed to consider and completely rejected evidence offered to it by petitioner upon his personal appearances, because of prejudice against Jehovah's witnesses.

The local board is charged with knowledge of the Regulations. The provision for personal appearance in the Regulations is mandatory when requested. Section 625.1 of the Regulation provides that "Every registrant, after his classification is determined by the local board . . . , shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (Form 57) to him."

The purpose of such appearance before the local board is to protect the rights of the registrant, correct illegal actions of the local board, and to obviate, if possible, an appeal in event of an erroneous classification.

Section 625.2 (b) of the Regulations provides that the registrant, upon such personal appearance, "may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification."

It is obvious that the purpose of the Regulations was to afford the registrant a full and fair hearing. The right to a personal appearance is an important one. Petitioner here, as a registrant, was entitled to be heard in person. It is fundamental that a personal appearance before a tribunal deciding any matter at issue is absolutely essential to insure justice and proper administration of law. In fact, the matter of personal appearance is recognized by the judiciary as being an indispensable factor of equal justice under law in the trial courts. It is fundamental that the appellate courts always yield to the finding of the trial court or jury upon issues of fact because the trial court is in a better position to judge the matter than the appellate court, inasmuch as the trial court has the advantage of the personal appearance of the litigants and witnesses.

The Regulations provide: "In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice." Section 623.1 (c).

When the petitioner had his personal appearances, a full and fair hearing was denied by the local board because

its members said that Jehovah's witnesses were not entitled to any rights under the law.

The undisputed evidence shows that the local board stated, contrary to Opinion No. 14 of National Headquarters of Selective Service System, and the decision of the court in *Hull* v. *Stalter*, 151 F. 2d 633 (C. A. 7th, 1945), that Jehovah's witnesses had not been recognized as entitled to classification and exemption as ministers of religion under the Act. This statement evidenced that the local board had prejudged petitioner's case before he made his personal appearances and that this prejudice existed at the time he appeared before the board on each occasion.

Additionally the board members stated that they had classified all other of Jehovah's witnesses as not entitled to exemption as ministers and that they were accordingly denying petitioner's claim. In other words, the position of the local board was that they could not and would not grant petitioner's claim for exemption because if they did they would have to grant claims for exemption of other of Jehovah's witnesses.

It is fundamental that it is the duty of the local board to consider a case according to the facts of the particular registrant and not according to the facts of other registrants. Each case stands on its own merits. [202] *Hull* v. *Stalter*, 151 F. 2d 633 (C. A. 7th, 1945).

The wanton disregard of the rights of the petitioner in this case, by this type of hearing, is best demonstrated by this analogy: Suppose that the trial court in this case had tried this case, had summarily rejected all evidence or disregarded all evidence and instructed the jury to find the petitioner guilty because of the facts disclosed in other cases involving Jehovah's witnesses or the findings in other cases. Such lawless conduct on the part of the trial judge would be summarily condemned by this Court. The administrative agencies are no freer in this respect than are the

courts. The trial judge below tried the case according to the facts. It was the duty of the draft board to determine the petitioner's claim for exemption according to the facts; and, not according to what had been done in the cases of other persons.

The very fact that Section 623.1 (c) of the Regulations provides that there shall be no discrimination or prejudice on account of race, creed or of membership or activity in any organization, proves that it was the intent of the Regulations not to allow that type of a thing which has happened here.

The action of the local board in this case is absolutely lawless because the members of the board decided the claim for exemption according to other cases and not according to the facts of petitioner's case. *Estep* v. *United States,* 327 U. S. 114, 121.

Appropriate here are the words of Judge Learned Hand, in *United States* v. *Balogh,* 157 F. 2d 939 (C. A. 2d, 1946). Although the decision in that case is not in point, Judge Hand condemned a remark demonstrating prejudice that was leveled at all of Jehovah's witnesses rather than at the individual. In that case, Judge Hand said:

"The concluding remarks of the chairman of the local board show that he at least did not understand his duties in the spirit of these directions. He was condemning Jehovah's Witnesses as a whole, when he said that all that 'you are interested in is evading the service of your country.' Had this been a conclusion addressed to Balogh individually, the result of an impartial appraisal of his personal refusal, it might indeed have been immune from attack in the courts. It was not; it was a conclusion denying the exemption to Balogh because of his membership, and not professing to detect him personally as a sham. We should for

that reason hesitate to accept the denial of the exemption, made as it was in that humor, even if the record were otherwise without flaw; but it is not."

The language of Judge Hand in that decision supports the proposition advanced here that the classification of the petitioner according to what had been done to other of Jehovah's witnesses, rather than according to the facts in his case, is contrary to law.

The denial of petitioner's claim for exemption because other of Jehovah's witnesses had been denied exemption constituted judgment according to prejudice and discrimination because of membership in the organization known as Jehovah's witnesses.

In *Niznik* v. *United States,* 173 F. 2d 328 (C. A. 6th, March 7, 1949), the court reversed the judgments of conviction and remanded the case to the trial court for a new trial on account of prejudice demonstrated by the local board upon the hearings. The statements in the *Niznik* case were highly inflammatory and went to the very limit of prejudice, that fell short of violence themselves. The mere fact that the statements here do not reach the point of violence and the draft board did not drop to the depth of venom that the draft board in the *Niznik* case dropped, does not prove that a similar result should not be reached here. The same principle that led the court in the *Niznik* case to reach its conclusion should lead this Court to the conclusion that the draft board order supporting the indictment should be invalidated because of the prejudice on the part of the local board.

The classification, being based on prejudice, is contrary to law. It makes invalid the order supporting the indictment.

THREE

The undisputed evidence shows that petitioner is not guilty of refusing to submit to induction because he never reached the room where the induction ceremony was to be had and there is no evidence that he was ever ordered to submit to induction.

The petitioner appeared at the local board on the date he was commanded to do so in the Order to Report for Induction. He thereafter proceeded to the induction station at Chicago. Following his arrival at the induction station he went through all of the selective process down to and including the physical examination which resulted in his being found physically acceptable. Immediately prior to the time that he reached the point where he was to go into the induction room he was handed a ticket entitling him to receive a uniform. At this point he decided that to proceed further would be a violation of his obligation to Almighty God as His minister. He did not go to get the clothes. He was never in the induction room. There is no evidence that it was ever arranged for him to undergo induction process.

Mansavage is charged by indictment with failure to submit to induction. There is not one iota of evidence that he was ever given an opportunity to violate the law. As stated by the United States Attorney for the District of Wisconsin, Madison Division, up to the point that Mansavage had gone, "Mansavage had not violated any provisions of the law or any regulation." [156]

Except for statements in the indictment, it appears that the Government complains primarily of petitioner's statement to the F. B. I. agent to the effect that he did not submit to induction. Petitioner's statement in itself, could not violate the Act or any of its regulations promulgated thereunder. One is not guilty of violating an act purely by declearing his conclusion. The corpus delicti was not established because there is no proof of an overt act of refusal to

submit to induction. Mansavage was never legally confronted with the duty of submitting to induction by command of an officer. Not being confronted with the duty, it cannot be said that he refused to perform a duty.

Section 11 of the Act, under which petitioner was prosecuted, provides, among other things, that any person "who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, . . . shall, upon conviction in the district of the United States having jurisdiction thereof, be punished . . ."

The duties imposed by the Regulations are separate and distinct. A violation of one regulation is altogether different from the violation of another. The failure to perform one duty is altogether different from the failure to perform another. The indictment in this case charged petitioner with failure to submit to induction. [3] The indictment did not charge generally that petitioner failed to perform a duty imposed upon him under the Act and Regulations. Such an indictment, although generally charging offense, would have supported a conviction of petitioner here.

But the indictment here charged petitioner with failure to submit to induction. The undisputed evidence shows that he was not asked to submit to induction. Therefore the petitioner is not guilty as charged in the indictment.

In *Falbo* v. *United States,* 320 U. S. 549, the various steps in the selective service process are described. They are summarized in this manner: "The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is accepted by the army, navy, or civilian public service camp. Thus a board order to report is no more than a necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently." A fail-

ure to comply with any step in the selective process is a separate and distinct violation of the Act. "He who reports to the induction station but refuses to be inducted violates § 11 of the Act as clearly as one who refuses to report at all." (*Billings* v. *Truesdell*, 321 U. S. 542, 557)

Since the propriety of punishing minutiae of a crime has been accorded particular approval by the courts and inasmuch as the offense of failure to submit is entirely distinct and different from the offense of failure to report there is a fatal variance. "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the complete transaction." *Albrecht* v. *United States*, 273 U. S. 1, 11. See also *Ebeling* v. *Morgan*, 237 U. S. 625 and *Baders* v. *United States*, 240 U. S. 391.

There is a *fatal* variance between the offense charged and the offense proved. The variance affected the substantial rights of petitioner and does not come within Rule 52 (a) of the Federal Rules of Criminal Procedure for that reason. The petitioner can still be indicted, tried and convicted for his violation of the Regulations, if any there was, in failing to report. The conviction in this case could not successfully be pleaded in bar. Former jeopardy would not be available to petitioner in event he should hereafter be indicted for the offense which was actually committed by him. This fatal variance cannot be brushed aside as harmless error. *Lowenberg* v. *United States*, 156 F. 2d 22 (C. A. 10th); *Bollenbach* v. *United States*, 326 U. S. 607; *Kotteakos* v. *United States*, 328 U. S. 750.

There is a clear distinction between reporting at the board and submitting. Failure to submit is not included in failure to report. *United States* v. *Collura*, 139 F. 2d 345 (C. A. 2d) is directly in point. The Collura case said that the refusal to continue to the point of submitting to induc-

tion constituted failure to report for induction. This failure was included in the offense of failure to report. The *Collura* case is in point because both Collura and Mansavage did not complete the "connected series of steps into the national service which begins with registration" and which "does not end until the registrant is accepted by the army, navy, or civilian public service camp." (*Falbo* v. *United States,* 320 U. S. 549, 553) Collura appeared at the induction station and attempted to bargain with the medical authority. He did not undergo the induction process. He was not examined at the induction station. He did nothing but report and refuse to go further. He did not have a chance to refuse to submit to induction.

In the case at bar, the petitioner in effect did the same thing. He went through the physical examination, after reporting. His failure to go further, although an offense, did not constitute failure to submit to induction. If the failure of Collura to proceed further constituted failure to report, so also does the failure of petitioner in this case. The failure of Mansavage to go further cannot be failure to report and failure to submit at the same time. Accordingly he was indicted for the wrong offense.

The Government will rely upon the language of the Court in *Billings* v. *Truesdell,* 321 U. S. 542, 557, where it is said: "He who reports to the induction station but refuses to be inducted violates sec. 11 of the Act as clearly as one who refuses to report at all. *United States* v. *Collura, supra.* The order of the local board to report for induction includes the command to submit to induction."

The mere fact that one who refuses to go further, or submit to induction, violates the Act as clearly as one who refuses to report does not mean that he can be convicted for failure to submit when facts viewed most favorably to the Government at most show that he was guilty of failure to report. It should be remembered that he was not offered the opportunity to submit. There are many different acts

of Congress that have penal provisions which may be violated in any one of several ways, but a person indicted for violating the Act in one way specifically described in the indictment cannot be convicted for violating the Act upon proof showing that he violated it in another way. *Kotteakos* v. *United States,* 328 U. S. 750.

One indicted for burglary could not be convicted of the offense of burglary if the facts showed that he was guilty only of theft. The offense of failure to report is equally as distinct from the offense of failure to submit as the offense of theft differs from that of burglary. It is fundamental that a defendant in a criminal case cannot be convicted of an offense different from that for which he is indicted.

It is therefore respectfully submitted that the trial court should have granted the motion for judgment of acquittal because of the fatal variance between the indictment and the proof.

FOUR

The trial court committed reversible error in excluding the testimony of the chairman of the board of appeal which was offered for the purpose of showing an arbitrary and capricious denial of petitioner's claim for exemption and ministerial classification.

The deposition of W. T. Doar, chairman of the board of appeal, was offered by petitioner. [48-63] The testimony offered which was excluded, if received, would have tended to establish arbitrary and capricious action. [48-63] Notwithstanding the holding of the trial court that it was a matter that should be addressed to the court rather than to the jury, he ordered the testimony excluded completely and did not himself consider it at all. [49-50]

The testimony was relevant upon the issue of whether there had been arbitrary and capricious action, to the prej-

udice of petitioner. The board of appeal was the final classifying agency and it was necessary for the petitioner to attack the final classification. The only way he could attack the classification, as being arbitrary and capricious, and the result of prejudice, was to question the members of the board of appeal.

Judge Learned Hand, in *Kulick* v. *Kennedy*, 157 F. 2d 811, (reversed on other grounds, 332 U. S. 174) in speaking of the right of a defendant being prosecuted for a violation of a final order of a Selective Service board, said: "As we understand it, at his trial he may call the members of the board and may himself take the stand; he may testify to what he told them, and he may cross-examine them as to their motives, and in general as to the basis of their finding." Compare *Consolidated Water Power & Paper Co.* v. *Bowles*, 150 F. 2d 960 (Em. App. 1945).

It seems only reasonable and proper that the petitioner should be allowed to interrogate the members of the draft boards. This is the most effective way and the surest way of proving arbitrary and capricious action.

In the ordinary administrative law cases, where judicial review is sought, the administrative agency makes its findings of fact, conclusions and order in writing. Such statements are available in the record for perusal to determine whether or not the conclusion is arbitrary, capricious or unlawful.

In cases where a hearing officer makes findings of fact, conclusions of law and recommendations, these are always in the record and available for scrutiny and examination in event the administrative determination is based upon such.

In the Selective Service Regulations, there is no provision for the statement of reasons or the writing of opinions by the local board and there is nothing in the Regulations in respect to such action by boards of appeal. The practice is, however, for boards of appeal not to state any reason.

Accordingly the only way that reasons can be ascertained or the course pursued by the administrative agency can be established in court, is to call the members of the board and subject them to examination under oath.

Section 8 (b) of the Administrative Procedure Act (61 Stat. 37; 5 U.S.C. § 1001) provides that the record of the administrative agency shall show all decisions and shall include a statement of "(1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." The very purpose of this was to enable the reviewing court to ascertain whether or not there was arbitrary and capricious action.

Inasmuch as judicial review is permitted in the trial of prosecutions of a defendant charged with the violation of an order issued by a board under the Selective Training and Service Act, by force of the same reason, oral testimony should be available to establish arbitrary and capricious action.

It was reversible error, therefore, for the trial court not to admit the proffered testimony in evidence. The petitioner plainly was prejudiced. The court should have received and considered the testimony. It may have been of use to the trial judge in determining whether or not the classification was arbitrary and capricious, because the course taken and the reasons supporting the decision did not appear from the papers in the cover sheet which the trial judge examined at the close of the evidence. He stated: "I have read the record of the Registration Board, together with the record of the Appeal Board in connection with this matter, and I am satisfied there is a substantial basis in fact to support the classification." [103]

It was not harmless error but it was prejudicial error for the trial court to exclude this evidence (*Kotteakos* v.

United States, 328 U. S. 750) and, therefore, the conviction cannot stand.

FIVE

The trial court committed reversible error in not permitting the jury to consider the testimony of petitioner which was given for the purpose of showing a denial of a full and fair hearing before the local board and the board of appeal.

The petitioner takes the position in this case that the draft board, as a matter of law, violated procedural due process. Therefore it would not be a question for the jury. For this reason, heretofore it has been urged upon this Court that the motion for judgment of acquittal should have been granted.

If this Court is of the opinion that the motion for judgment of acquittal should not have been granted because it was a question of fact for the jury, then this point becomes pertinent. If, however, the Court reaches the conclusion that the motion for judgment of acquittal should have been granted, it will be unnecessary to consider the question presented under this point.

In instances where there has been a dispute in the testimony, or a question of fact has been raised as to whether or not the testimony actually given upon personal appearance was new and additional, the courts have held that whether there was a violation of the Regulations or of procedural due process in such instances was for the jury to determine. *Smith* v. *United States,* 157 F. 2d 176; *United States* v. *Zieber,* 161 F. 2d 90. In *Niznik* v. *United States,* 173 F. 2d 328 (C. A. 6th, March 7, 1949) the court remanded the case for a new trial with the proviso that if the evidence was the same upon another trial the court should grant the motion for judgment of acquittal. In the *Niznik* case, the board members did not testify.

Whatever may be the distinction in the decisions in the *Niznik, Smith* and *Zieber* cases, the law is settled that if the violation of the Regulations is not established, as a matter of law, then it becomes a question of fact for the jury to decide.

If this Court reaches the conclusion that the violation is not established in this case as a matter of law, then it is necessary for this Court to determine whether or not the trial judge in this case committed reversible error in the ruling that the jury could not hear certain evidence, which ruling was made during the testimony of the petitioner.

The Government objected to the petitioner's testifying as to what transpired between him and the members of the local board upon the various occasions that he appeared for hearings. [69] The court below held that it was not a matter for the jury but for the court. [69-70] This procedure was objected to by petitioner's counsel. [69-71] Counsel again requested the court to allow the petitioner to testify as to these hearings in the presence of the jury. [73] The court refused. [73] Exception was taken to the ruling of the court on the grounds that it deprived the petitioner of his right of trial by jury and that it violated his rights contrary to the Constitution. [85]

The petitioner will not labor the argument under this point at length. From what was said by the courts in the *Smith, Zieber* and *Niznik* cases, it is observed that it was a question for the jury in event the motion for judgment of acquittal should not be granted. It was highly irregular for the trial court (if the issue should have been submitted to the jury) to exclude the evidence from the consideration of the jury and confine the evidence to his own consideration. His ruling emasculated completely the function of the jury upon the issue. It prevented the jury from exercising its prerogative following the denial of the motion for judgment of acquittal.

It is submitted, therefore, that the trial judge committed reversible error in excluding the evidence from the consideration of the jury.

Conclusion

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under the Judicial Code and the Rules of this Court. To that end the petition for writ of certiorari should be granted so as to correct the errors committed; and petitioner further prays that the judgments rendered by the district court and court of appeals against petitioner be reversed, and petitioner discharged or, in the alternative, that the judgment be reversed and the cause remanded for further proceedings.

Respectfully submitted,

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